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No. 91-217

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES AND PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

JOINT REPLY BRIEF TO THE UNITED STATES' BRIEF IN OPPOSITION

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JOINT REPLY BRIEF TO THE UNITED STATES' BRIEF IN OPPOSITION

INTRODUCTION

The brief for the United States in opposition was received by the attorneys for the State of Washington ("State") on October 21 and by the attorneys for Public Utility District No. 1 of Pend Oreille County ("PUD") on October 22, 1991. The following is a reply to the Brief for the United States in Opposition ("U.S. Brief").

OPINION BELOW

The opinion of the district court is set forth in Pet. App. pages 149a-173a. The United States was mistaken when it stated at page 1 of the U.S. Brief that the opinion of the district court at issue is a reported opinion. The opinion of the

district court at issue is an unreported opinion.

STATEMENT RELEVANT TO REPLY TO U.S. BRIEF

The district court found that there were two distinctive vegetation lines along the Pend Oreille River. (Pet. App. 158a) The lowest line is at 2028 feet above mean sea level. In its findings, the district court stated the following:

> The first line appears at approximately 2028 and represents the dividing line between any edible vegetation and no vegetation, (water in most cases). The vegetation at the lower level consists of grass edible by cattle. This grass has some minimal nourishment value for range cattle.

Pet. App. at 158a.

> There are occasional black cottonwoods (generally at the approximate elevation of 2037-2038), but this specie primarily appeared above the 2041 elevation.

Id. at 159a.

> No agricultural (tilling or cultivating) of the soil took place below the 2041 elevation.

Id. at 159a.

The second distinctive vegetation line found by the District Court was at elevation 2041. Id. at 161a. The Federal District Court stated that the second distinctive line was evidenced by two different factors - in the gradually sloping areas of the reservation (30% of the banks) there was a "change in vegetation from rough grass to a grass containing more nourishment and the appearance of bushes... ." Id. In the steep bank areas (70%) of the reservation, the 2041 line appeared at or near the top of the river bank. Id. Finally, the court noted that in early photographs taken in the 1920's or 30's, the distinctive line

in the vegetation was apparent at 2041. Id. at 161a-162a.

REPLY TO U.S. ARGUMENT

At page 4 of the U.S. Brief, the United States argues that the decision of the Court of Appeals "does not conflict with any decision of this Court, the Washington Supreme Court, or any other federal court of appeals." Such argument is clearly wrong. See the argument made by the Petitioners in its Joint Reply Brief to Kalispel Indian Tribe's Brief in Opposition at pages 2-5, and see, *Borough of Ford City v. United States*, 345 F.2d 645, 651 (3d Cir.), cert. denied, 382 U.S. 902 (1965).[1]

[1] In *Ford City*, the Court of Appeals stated:

> The District Judge ... erred in law. He categorically held that the Allegheny River bed at Ford City is 'land upon which the

At page 5 of the U.S. Brief, the United States alleges that the Petitioners (State and PUD) do not "suggest that the courts below misapplied the rule of *Austin v. Bellingham*." Such statement could not be further from the truth. As later noted at page 6 of the U.S. Brief, the Petitioners argued that the opinion in *Austin v. Bellingham*,[2] which relied upon by Ninth Circuit Court of Appeals and the United States District Court is dicta. The land at issue in *Austin* was covered by tame grass, trees and stumps, and had been

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> action of the water has been so constant as to destroy vegetation.'

Id. at 651. This is the same error that the federal district court made in this Pend Oreille River matter, which error was affirmed by the Ninth Circuit Court of Appeals. The district court found that elevation 2028 is the line between edible vegetation with "minimal nourishment value" and "no vegetation." Pet. App. at 158a.

[2] 69 Wash. 677, 126 Pac. 59 (1912).

cultivated.[3] The land at issue in *Austin v. Bellingham* is very different than the land along the Pend Oreille River. In this case, the land at issue had rough grass with "minimal nourishment value." There were very few trees and were no stumps on the land at issue herein. There has been no cultivation on the land at issue herein. Infra, at pp. 2 and 3.

On pages 9 and 10 of the United States' Brief in Opposition, the United States argues that *Howard v. Ingersoll*,[4] *United States v. Harrell*,[5] *United States v. Claridge*,[6] and *Borough of Ford City v.*

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[3] 69 Wash. at 679, 126 P. at 60.

[4] 54 U.S. (13 How.) 381 (1851.

[5] 926 F.2d 1036 (11th Cir. 1991).

[6] 416 F.2d 933 (9th Cir. 1969), cert. denied 397 U.S. 961 (1970).

United States,[7] establish a rule that the line of ordinary high water in the "equal footing" and constitutional sense is at a line below which no vegetation grows and that all of those cases support the legal conclusions of the Ninth Circuit Court of Appeals and the United States District Court below in this case. An analysis of the cases cited by the United States show that those cases are inapposite and do not support the conclusion of the United States. *Howard v. Ingersoll* is not a case which involves a "line of ordinary high water" which describes the boundary between soils acquired by a sovereign state under the "equal footing" doctrine. *Howard v. Ingersoll* is a case involving a non-navigable water and involves the

[7] 345 F.2d 645 (3d Cir.), cert. denied 381 U.S. 901 (1965).

construction of a cession agreement which described a boundary as the "west bank of the Chattahoochee River." Therefore, *Howard v. Ingersoll* is not helpful in establishing a line of ordinary high water under the Constitution of the State of Washington, Article XVII, Section 1, or in the determination of the line of ordinary high water on a navigable river which has an annual hydrological cycle which includes an ordinary high water that occurs every spring of the year.

The land at issue in *United States v. Harrell* was on an non-navigable river. The land contained commercial stands of trees and timber.[8] The waters at issue arose from the navigable Tombigbee River; however, the Tombigbee waters were

[8] *United States v. Harrell*, supra at 1038.

unpredictable and did not have an ordinary annual hydrological cycle where the river always rose to a high level.[9]

United States v. Claridge was a *per curiam* opinion issued by the Ninth Circuit Court of Appeals. In that case, in support of its conclusion, the Ninth Circuit Court cited[10] *Howard v. Ingersoll* (a boundary case involving the construction of a cession agreement), *Alabama v. Georgia*,[11] (a case involving the same boundary and the same cession agreement and the same cession language as *Howard v. Ingersoll*)

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[9] Id. at 1042. Compare the water in *Harrell* with the Pend Oreille River, Pet. App. at 162a-163a. The land at issue on the Pend Oreille River is actually along the navigable river.

[10] *United States v. Claridge*, supra at 934.

[11] 64 U.S. (23 How.) 505, 16 L.Ed. 556 (1860).

and *Oklahoma v. Texas*[12] (which involved another boundary dispute concerning the construction of a treaty between the United States and independent separate state of Texas and which also did not involve a navigable river but rather involved the construction to be given to the "southern bank of the Red River").[13]

Borough of Ford City v. United States, cited by the United States, as previously discussed, was a case where the Third Circuit Court of Appeals expressly rejected the concept that the line of ordinary high water as the boundary of property owned by a state as part of its sovereign prerogatives is the line below

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[12] 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1925).

[13] See previous Joint Reply Brief filed by the Petitioners, at p. 10.

which no vegetation grows.[14] Rather, in *Ford City*, the description of the line of ordinary high water approved by the Third Circuit Court of Appeals was the line of transition and vegetation caused by the presence of water.[15]

CONCLUSION

The Petition for Writ of Certiorari should be granted and the decision of the Ninth Circuit Court of Appeals should be stayed pending the decision of the Supreme Court of the State of Washington in *Public Utility District No. 1 and State of Washington, Department of Natural Resources v. Tombari Family Limited Partnership of Washington*, Washington Supreme Court Docket No. 57239-9. At such

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[14] 345 F.2d at 651.

[15] Id. at 650.

time as the Supreme Court of Washington issues its opinion, the issues will be squarely framed. Failure to grant certiorari may well result in the boundary of the State's sovereign lands along navigable rivers being dependent upon the gratuitous fact as to whether or not the land borders an Indian reservation. No reason for such possible distinction and dependency has been given by the United States in its Brief in Opposition and such distinction should not exist.

DATED this 23rd day of October, 1991.

Respectfully submitted,

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STATE OF WASHINGTON)
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I, JERRY K. BOYD, being first duly sworn on oath, depose and say:

That on the ___ day of October, 1991, I placed three copies of the foregoing Joint Reply Brief of Petitioners to Kalispel Indian Tribe's Brief in Opposition to the United States Court of Appeals for the Ninth Judicial District, with Appendix, in the United States mail, first-class postage prepaid, to the following counsel of record:

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SIGNED AND SWORN to before me on the __ day of October, 1991, by _____.

_____
Notary Public in and for the State of Washington residing at Spokane.
My commission expires:

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